
Informed Consent in Public Sector Dispute Resolution

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Informed consent is a basic premise of civil society in general. A free, civil society functions when individual autonomy is respected (and protected under the law), self-determination is supported, and actions are entered into with full (or at least sufficient) information as to the rights, responsibilities, and risks those actions entail. In public sector dispute resolution, with its claims of advancing and deepening democracy, transparency and inclusiveness, informed consent is absolutely essential. The stakes are perhaps even greater than in more common two-party, court-sponsored mediation: not only are the rights of individuals at stake, as might be the case in a bilateral, court-annexed mediation, but the very functioning of government and civil society writ large may be at stake.

However, the notion of informed consent in the multi-party, political, usually highly complex arena of public sector mediation is challenging for several reasons. For the purposes of this article, we focus on procedural, process, or participation consent, rather than on what it means to consent to a final outcome or agreement (a subject for another day). We describe four key challenges below.

- *Informed consent about alternatives to mediation.* In two-party mediation under the auspices of a Court, the informed consent of the parties' alternatives, in broad terms at least, is relatively clear: seek to reach a consensual, voluntary settlement agreement in mediation or to take your chances under law before the Court. In public sector mediation, the parties' alternatives or BATNA are rarely so clear. Should the party sue or consent to participate in mediation? Should the party seek to influence the agency/board in authority through political means? Should the party seek to engage in some kind of media or political organizing effort to better influence the outcome and meet their interests? How might the party undertake multiple and coordinated efforts among these strategies to advance their interests? Each party has so many possible alternatives, it is difficult for a mediator to clearly explain: here is what mediation has to offer and here is the alternative to mediation. Given this complexity, assuming a mediator's role is to help a party consider the pros and cons of her choices, to what degree should the mediator help the parties' explore these alternatives? Can the

mediator even speak to the general outlines of what an advocacy campaign might look like without exceeding her role? What role does the mediator have in ensuring the various parties – of different skills and knowledge -- have sufficiently considered the risks of these multiple choices?

- *Informed consent about agents or representatives.* In a simple, two-party mediation (though agents may complicate the equation), the parties know who they are or who might represent them. In a multi-stakeholder public dispute, all of the public cannot practically sit at “the settlement table.” Thus, who can represent large numbers of individuals or constituents? Is it enough that a Board or organizational head signs off on a representative for an organization representing potentially hundreds or thousands? What if some minority of the membership states that this choice is illegitimate? How do you represent diffuse stakeholder interests, such as unorganized “beach users’ or “national park visitors” or the public in general? Is it informed consent if a general membership has no direct or active say in how its interests might be or are represented in public sector mediation? On the other hand, would any process ever get underway if informed consent of all affected parties was thoroughly sought first and foremost?

- *Informed consent and government parties.* Administrative agencies or bodies often consent to be “influenced” or to allow their decisions to be “shaped” by the process (in some cases, that consent is spelled out by law such as in the Negotiated Rulemaking Act). Nonetheless, they retain their full legal authority and are often, in reality, quite ambivalent about how much to defer to stakeholder consensus at the end of the day (not to mention the highest level decisionmakers often engage only at key points and are certainly known to chart a different course than their staff at the 11th hour). So, how does a mediator adequately and accurately explain this “first among equals” role of the sponsoring or convening government agency or body. How does the mediator ensure that “consent” to participate in full good faith has really been given by the agency?

- *Informed consent about highly complicated technical, legal, regulatory, political and administrative matters.* Though no one assumes that informed consent requires a detailed knowledge of the law for parties (though a vigorous and deserved debate regarding pro se cases and informed consent is underway), the notion does assume the parties have at least a general sense of the outlines of the legal issues at stake, the process and role of the courts, and the use of mediation in that light. But for public sector dispute resolution processes, the cases are often enormously complex. Numerous legal issues and matters are at stake. Complex legislation and regulation shapes and constrains the bargaining space. Many issues involve highly technical matters ranging from ecosystem management to risk assessment for toxic chemicals. And, all of these public processes take place in the relatively free form and dynamic space of politics. Therefore, how informed do ten or twenty or thirty lead negotiators (and their hundreds to thousands of constituents) need to be regarding these matters? And, whose responsibility is it to “sufficiently” inform them?

To address these challenges, the field of public sector dispute resolution has developed various tools and techniques (though rarely are they explicitly described as seeking to provide informed consent). While imperfect, they do provide, in our view, a basis for determining informed consent in public sector dispute resolution.

- *Stakeholder and Issues Assessment.* In simple, two-party mediation, the mediator often enters the mediation with limited knowledge of the case and interaction with the parties. However, in a public sector mediation, who the parties are, what issues might be under negotiation, who might represent those parties, and who knowledge parties have about the range of rules and regulations is often uncertain. Thus, either informally or very formally, mediators often undertake an assessment based on numerous confidential interviews. The assessment provides a tool for seeking the parties' views on who the full range of parties to the dispute are, who might represent them, what issues are of most importance, and, importantly, it provides an opportunity to explain the process of mediation, negotiated rulemaking, joint fact finding, or whatever process may be under consideration. The assessment process also provides a means for the mediator to test with the sponsoring agency or government body if it has the sufficient will, resources, and commitment to a mediation effort. The process of assessment, if done thoroughly and well, helps increase the likelihood of informed consent to a mediation process by engaging the parties before any process is designed, let alone initiated, to allow them to shape and learn about the mediation process. One in fact might argue that for public sector mediation efforts, if at least an informal assessment is not done, the parties cannot reasonably be expected to offer their informed consent.

- *Process Protocols or Groundrules.* Assuming a mediation process is convened, public sector dispute resolution has developed another tool to ensure the informed consent of the diverse parties. Such protocols usually cover the mission or scope of the process, the rights and responsibilities of the stakeholders, agencies, and mediators, and prescribe basic codes of conduct for civil discourse. In short-term, simpler public processes, these protocols might be no more than a one-page set of groundrules. In complex processes such as regulatory negotiation, the protocols are often quite lengthy. Usually, the parties engage the mediators in reviewing a draft of groundrules, and as a first test of the group's ability to work together, negotiate these terms. Though often not explicitly stated as such, this effort seeks to obtain the informed consent of the parties to the dynamic process in which they are about to participate. The very dialogue and debate about the groundrules helps the parties to consider the shape, form, risks and responsibilities of the process, increasing the likelihood of informed consent. Again, one can easily argue that without a set of groundrules or protocols consented upon by participants, the public mediation has not obtained sufficient consent (what detail might be in those groundrules to ensure "sufficient" consent is also a discussion for another day).

- *Education.* Because the matters and context in most public sector mediation is so complex, the field of dispute resolution often advocates for a learning or education period at the start of the process. Numerous and diverse parties usually come to the negotiating table with a range of

knowledge and skill. One cannot expect these parties to enter into a process sufficiently informed without a review of the legal issues at stake (such laws as the Federal Advisory Committee Act, the Administrative Procedures Act, and other statutes often inform federal public sector mediation, for instance), the regulatory context (which may range from regulations to enabling legislation to executive orders to agency policy guidance documents), and the technical context (processes usually involve consideration of numerous, complex, and often contradictory technical studies, reports, and data). Though the assessment process can increase informed consent about representation and the process and establishing protocols can bring clarity and detail to that informed consent, without an initial education on the context itself, it is difficult to imagine that fully informed consent can be obtained without it.

These three requirements – assessment, groundrules, and education – serve as the basis in public sector dispute resolution for garnering sufficient informed consent to public sector alternative dispute resolution processes. At the same time, the problematic nature of informed consent in these public processes is addressed but not fully resolved. Representation, ratification, the and the powerful role of government agencies all remain challenges to the field and to fully informed consent.

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